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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 E.W. BURTON,

12 Plaintiff,

13 vs.

14 J. BEARD,

15 Defendant.
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CASE NO. 15cv2314-LAB (MDD)

**ORDER DENYING CERTIFICATE OF
APPEALABILITY AND REQUEST TO
PROCEED IN FORMA PAUPERIS ON
APPEAL**

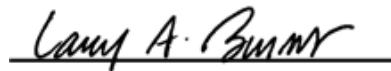
17 Burton filed a request for a stay and abeyance in this Court pending exhaustion of
18 state court remedies in anticipation of the Ninth Circuit Court of Appeals granting his pending
19 application to file a second or successive habeas petition in this Court challenging his state
20 conviction. (Docket no. 1.) He didn't, however, file a writ of habeas corpus in this action.
21 Nor did he contend that he's a capital prisoner. So the Court dismissed this case without
22 prejudice and explained that "[i]f Petitioner wishes to proceed with a habeas action in this
23 Court he must (as is the case with all non-capital prisoners) file a petition for a writ of habeas
24 corpus, which will be given a separate civil case number," and "if Petitioner is in fact a capital
25 prisoner, he may request the Court to re-open this action in order to permit him to file a
26 Petition under the civil case number assigned to this action." (Docket no. 2.) Burton did
27 neither.

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1 Under Rule 11 of the Rules Governing Section 2254 Cases, the Court is required to
2 issue or deny the certificate of appealability because it has entered a final order adverse to
3 the petitioner. The Court finds reasonable jurists would not disagree with the Court's
4 dismissal. See *Slack v. McDaniel*, 529 U.S. 473, 483–84 (2000) (giving standard for
5 issuance of certificate of appealability). So the application for a certificate of appealability
6 (Docket no. 4) is **DENIED**. Additionally, for the reasons set forth above and in the Court's
7 previous order, the Court certifies that the appeal would not be taken in good faith, and
8 Burton's motion to proceed in forma pauperis on appeal (Docket no. 5) is therefore **DENIED**.
9 See Fed. R. App. P. 24(a)(3)(A) and 24(a)(4)(B).

10 **IT IS SO ORDERED.**

11 DATED: March 30, 2016

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13 **HONORABLE LARRY ALAN BURNS**
14 United States District Judge
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